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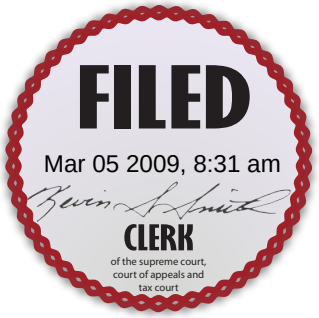


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| RODNEY DECKARD, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 58A01-0804-PC-179 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE OHIO CIRCUIT COURT
The Honorable James D. Humphrey, Judge
Cause No. 58C01-0707-PC-001

**March 5, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Facing six felony charges, including a charge for attempted murder, Rodney Deckard pled guilty to intimidation with a deadly weapon and two counts of child molesting. In exchange for his guilty plea, the State dismissed the remaining charges and agreed to recommend an aggregate sentence of sixty years with thirty of those years suspended. Deckard petitioned for post-conviction relief, alleging that his guilty plea was involuntary and that trial counsel was ineffective for failing to tell him that the evidence was insufficient to convict him of attempted murder. The post-conviction court denied relief, and Deckard now appeals. On appeal, he raises two cognizable arguments: that his guilty plea was involuntary and that trial counsel was ineffective. We conclude that Deckard's guilty plea was not involuntary because he pled guilty to receive a benefit well beyond the dismissal of the attempted murder charge and that counsel was not ineffective because Deckard suffered no prejudice due to counsel's recommendation that he accept the plea agreement. We therefore affirm.

## Facts and Procedural History

K.W. was born in 1993. Tr. p. 25.[1] On November 28, 2005, police officers in Ohio County, Indiana, responded to a call from someone at Deckard's residence regarding an alleged sexual act between Deckard and K.W., his stepdaughter. *Id.*; P-C Tr. p. 29. When the officers arrived at the home, they found thirty-four-year-old Deckard sitting outside the residence with a loaded shotgun pointed at his own head. P-C Tr. p.

[1] There are two transcripts included in the appellate record. We use "Tr." in this opinion to refer to the transcript volume containing the transcripts of Deckard's guilty plea hearing and sentencing hearing. We use "P-C Tr." to cite to the transcript of the hearing on Deckard's post-conviction petition.

22, 29. Deckard pointed the loaded weapon at Deputy Chris Curry. *Id.* at 27. He did not, however, fire it. Another officer convinced Deckard to put down his shotgun. *Id.* at 24. Deckard was then arrested.

During the investigation into the molestation allegations, police interviewed K.W. and Deckard. K.W. informed the investigating officer that Deckard had touched her on the inside and outside of her vagina and that he had touched her vagina with his mouth. *Id.* at 36. Deckard gave a taped statement to the police in which he confessed to inserting his finger into K.W.'s vagina and to placing his mouth and tongue on her vagina on another date. *Id.* at 20. In addition, Deckard admitted to pointing a loaded shotgun at Deputy Curry. *Id.* at 27.

The State charged Deckard with attempted murder[2] and Class C felony intimidation with a deadly weapon[3] for his actions toward Deputy Curry and with two counts of Class A felony child molesting[4] and two counts of Class C felony child molesting[5] for his actions toward K.W. Appellant's App. p. 26-29. The State offered Deckard a plea agreement and it agreed to dismiss the attempted murder charge and two Class C felony charges and recommend an aggregate sentence of sixty years with thirty of those years suspended, if Deckard pled guilty to the remaining counts. *Id.* at 18-25; P-C Tr. p. 7. Deckard pled guilty to two counts of Class A felony child molesting and

[2] Ind. Code §§ 35-42-1-1, -41-5-1.

[3] Ind. Code § 35-45-2-1(a)(2), (b)(2).

[4] Ind. Code § 35-42-4-3(a)(1).

[5] I.C. § 35-42-4-3(b).

intimidation with a deadly weapon pursuant to the plea agreement. Appellant's App. p. 18-19. The trial court accepted the agreement and sentenced Deckard accordingly. *Id.* at 14-17A.[6]

Deckard did not pursue a direct appeal. However, in July 2007, Deckard filed a *pro se* petition for post-conviction relief. *Id.* at 1. Counsel later appeared and filed a supplemental petition for post-conviction relief. *Id.* The post-conviction court held a hearing on Deckard's petition and later accepted memoranda from the State and Deckard regarding the merits of Deckard's petition. *Id.* at 2.[7] The post-conviction court ultimately denied Deckard's petition, and he now appeals.

**Discussion and Decision**

Deckard appeals from the denial of post-conviction relief. He presents several arguments, which we restate as two: (1) whether Deckard's guilty plea was voluntary and (2) whether Deckard received ineffective assistance of trial counsel because his attorney mistakenly believed that he could be found guilty of and sentenced for attempted murder.

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Hall v. State*, 849 N.E.2d 466, 468-69 (Ind. 2006). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a

[6] The final page of the trial court's Pronouncement of Sentence, found in the Appellant's Appendix, is not numbered, and it falls between the pages numbered sixteen and seventeen. We therefore refer to this unnumbered page as "17A."

[7] None of the filings with the post-conviction court have been included in the appellate record. These documents would have been helpful to our review of this appeal.

negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The reviewing court will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). Pursuant to Indiana Post-Conviction Rule 1(6), the post-conviction court issued findings of fact and conclusions of law. We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall*, 849 N.E.2d at 469. Such deference is not given to conclusions of law, which are reviewed *de novo*. *Chism v. State*, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

In post-conviction proceedings, claims that are known and available at the time of direct appeal, but are not argued, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001), *reh'g denied*. They cannot be subsequently raised in the post-conviction setting. One exception to this waiver rule is a challenge to the voluntariness of a guilty plea. *State v. Moore*, 678 N.E.2d 1258, 1265-66 (Ind. 1997). Another exception to the waiver rule is the argument that a defendant was deprived of the right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution. *Singleton v. State*, 889 N.E.2d 35, 38 (Ind. Ct. App. 2008).

We begin by noting that on appeal Deckard challenges the sufficiency of the evidence to support his two convictions for Class A felony child molesting, Appellant's Br. p. 21-23, and the length of his sentence, *id.* at 17-21. These claims were available for direct appeal and are not available to Deckard on post-conviction review. *Reed v. State*, 856 N.E.2d 1189, 1193-94 (Ind. 2006); *Timberlake*, 753 N.E.2d at 597.

## I. Voluntariness of Guilty Plea

Deckard first contends that the post-conviction court erred in finding that his guilty plea was voluntary. He argues that the prosecution coerced him into pleading guilty by charging him with attempted murder and offering to dismiss this charge if he pled guilty to other charges. "[D]efendants who can show that they were coerced or misled into pleading guilty by the judge, prosecutor or defense counsel will present colorable claims for [post-conviction] relief." *Moore*, 678 N.E.2d at 1266. Our review of the voluntariness of a guilty plea "focuses on whether the defendant knowingly and freely entered the plea." *Id.*

Deckard's argument is based upon the premise that the evidence could not have supported a conviction for attempted murder. Specifically, he contends that pointing a loaded firearm at another person without pulling the trigger, or even attempting to pull the trigger, does not amount to attempted murder. The State contends that because the prosecution believed that the evidence was sufficient to support a conviction for attempted murder, even if incorrect, Deckard's guilty plea was not involuntary because there is no evidence that the prosecution's exercise of discretion in charging him with attempted murder was a "ploy to secure his guilty plea." Appellee's Br. p. 11. We absolutely agree with the State that prosecutors enjoy wide discretion in deciding how to charge a defendant and that "a prosecutor is not required to demonstrate evidence on every element of an offense in order to file a charge or use a charge in guilty plea negotiations." *Id.* (citing *Smith v. State*, 770 N.E.2d 290, 296-97 (Ind. 2002)). We also agree that there is no indication that the prosecution in this case acted with any intent to

mislead Deckard as to the viability of the attempted murder charge. However, we have previously explained:

> [W]e have no difficulty in concluding that a threat by a prosecutor to do what the law will not permit, if it motivates a defendant ignorant of the impossibility, renders the plea involuntary. In such a circumstance, the representation takes on the character of a trick or an artifice inducing the plea, *even though the prosecutor is also unaware of its forbidden character*. In effect, the defendant is deceived into making the plea, and the deception prevents his act from being a true act of volition.

*Nash v. State*, 429 N.E.2d 666, 671 (Ind. Ct. App. 1981) (emphasis added) (citation omitted). Thus, the proper inquiry is whether Deckard was induced to plead guilty by the fear of a conviction that the "law [would] not permit." *Id*. We examine "the materiality of the [incorrect information] in the decision to plead." *Segura v. State*, 749 N.E.2d 496, 504-05 (Ind. 2001).

Deckard argues that "without that attempted murder charge, this plea agreement would not have been made." P-C Tr. p. 4. He contends that he would not have agreed to his "excessive" sentence but for the risk of being convicted of attempted murder had he gone to trial. *Id.* We cannot agree. Whether or not the evidence would have been sufficient to support an attempted murder conviction, we cannot say that Deckard's guilty plea was motivated by the attempted murder charge. Although Deckard points to his trial counsel's testimony and his own testimony from the post-conviction hearing as evidence that he would not have pled guilty but for the State's agreement to dismiss the attempted murder charge, *see id.* at 8, 16-17, Deckard's decision to plead guilty was a pragmatic one. In exchange for his guilty plea to three felony charges, the State agreed to dismiss three felony charges. Appellant's App. p. 18-19. In addition to dismissing the attempted murder charge, the State dismissed two Class C felony child molesting charges. *Id.* at 18-

19, 26. Further, the evidence against Deckard was overwhelming. The post-conviction court found that he faced a likelihood of conviction on the child molesting charges due to his confession, K.W.'s statements, and Deckard's actions at the time of his arrest. *Id.* at 3-4. The court further found that Deckard's guilty plea was motivated by "a conscious decision to avoid more severe penalties," which the court deemed a "reasonable consideration, given the fact that the probable cause affidavit indicates that this sexual activity went on with the child for years, i.e. approximately age three to twelve." *Id.* at 5. Indeed, although Deckard attempts to downplay the benefit of his plea agreement on post-conviction review, the sentence imposed by way of the trial court's acceptance of the agreement is lenient compared to the sentence that the trial court could have imposed for the same convictions absent a plea agreement.[8] The agreement called for the trial court to sentence Deckard to an aggregate term of sixty years with thirty of those years suspended to probation, Appellant's App. p. 19, whereas Deckard faced a possible maximum term of 108 years executed if convicted *of the same three offenses* without the benefit of the plea agreement, Ind. Code §§ 35-50-2-4, -6(a). The attempted murder charge was not material to Deckard's decision to plead guilty, and, thus, the post-conviction court did not err in denying relief on this ground.

**II. Ineffective Assistance of Trial Counsel**

Deckard next contends that he received ineffective assistance of trial counsel because counsel failed to challenge Deckard's attempted murder charge and incorrectly

[8] In a recent opinion, our Supreme Court clarified that where a plea agreement such as Deckard's provides that the State will "recommend" a particular sentence and there is no indication that the parties contemplated that the trial court might exercise discretion in sentencing the defendant, the trial court is bound to impose the recommended sentence if it accepts the plea agreement. *St. Clair v. State*, --WL--, No. 76S03-0805-CR-215, slip op. at 6-7 (Ind. Feb. 17, 2009).

advised Deckard to plead guilty in order to avoid the risk of conviction for attempted murder. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh'g denied*. A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh'g denied*), *trans. denied*. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

Here, even if we were to find that counsel rendered deficient performance in failing to seek the dismissal of the attempted murder charge or by recommending to Deckard that he accept the plea agreement, Deckard was not prejudiced by these things. As the post-conviction court found, the evidence against Deckard on the charges to which he pled guilty was overwhelming, and Deckard "made no showing that there's a

reasonab[le] [possibility] that he would not have been convicted had he gone to trial." Appellant's App. p. 6. He gave taped confessions regarding his molestations of his young stepdaughter, and he admitted to pointing a loaded shotgun at Deputy Curry while Deputy Curry responded to a call from Deckard's home. Further, the sentence Deckard received pursuant to the terms of his plea agreement is far more lenient than the sentence that trial court could have imposed for the same convictions. We cannot conclude that the outcome of Deckard's proceeding would have been any different had he rejected the plea agreement and proceeded to trial, and therefore Deckard was not prejudiced by trial counsel's performance. The post-conviction court did not err in concluding that Deckard did not receive ineffective assistance of trial counsel.

Affirmed.

RILEY, J., and DARDEN, J., concur.